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WHAT IS THE TEST OF A REGULATION OF FOREIGN OR INTERSTATE COMMERCE?

NO class of cases are more perplexing than those involving the distinction between the power of Congress to regulate foreign or interstate commerce and the so-called police power of the States. It has always been conceded that there were many kinds of laws, such as quarantine laws, health laws, etc., operating upon foreign or interstate commerce, which were within the power of the States. How are such laws to be distinguished on principle from regulations of foreign or interstate commerce within the exclusive power of Congress? On this point the more recent cases are very unsatisfactory. While these cases almost always commend themselves to our common sense as actual decisions upon the facts, the reasoning upon which the decisions are based is meagre and unsatisfactory; indeed, very little general reasoning is attempted. The court almost invariably confines itself to a decision upon the facts involved.

The cause of this hesitancy of the judges to lay down general principles upon the distinction between laws affecting foreign or interstate commerce, which are within the powers of the States, and those which are regulations of foreign or interstate commerce, and within the exclusive power of Congress, is, in the opinion of the writer, to be ascribed to the confusion in which the law was left by

certain of the earlier cases, in which the controversy over the question whether the commercial power of Congress was "concurrent" or "exclusive" was carried on. This controversy was really political in its nature. It involved directly the great question of "State" or "national" sovereignty,the burning question of the time. The political bearing of the controversy accounts for the bitterness with which it was carried on, and the extreme confusion in which it left the law upon all questions involved in it. Fortunately, this controversy did not begin in the earliest cases decided by the Federal Supreme Court, involving the distinction between laws affecting foreign or interstate commerce and laws which are regulations of foreign or interstate commerce, and it is these earliest cases which, in the opinion of the writer, contain the true principles upon the subject.

In this article, then, the writer proposes to take up these earliest cases, and analyze them, with the view of coming at the precise principle which they lay down for distinguishing laws affecting foreign or interstate commerce, but which are not regulations of such commerce, from true regulations of foreign or interstate commerce; then to pass to the cases in which the great controversy over "exclusiveness" or "concurrency" of the commercial powers of Congress was carried on, and endeavor to point out certain elements of confusion introduced by these cases into the law; and lastly, to take up some of the more important cases and clauses of cases since decided by the Federal Supreme Court, and study them with the view of ascertaining how far, if at all, they modify or alter the principles of law laid down in the earliest cases, and what the law is at present in the light of recent decisions.

The first case in which the Supreme Court of the United States construed the clause in the Federal Constitution conferring power upon Congress to regulate commerce with foreign nations and among the several States, and with the Indian tribes, was the great case of Gibbons *v.* Ogden, 9 Wheat. 1, in which Chief-Justice Marshall delivered the opinion of the Court, after listening to the arguments of some of the ablest constitutional lawyers of the day, including Daniel Webster. That case involved the validity of a law of the State of New York, granting to certain persons the exclusive right to navigate all navigable waters of the State in vessels propelled by steam. The owners of this exclusive right had obtained an injunction from a New York Court restraining

the defendant, who owned a steam-vessel, enrolled as a coaster under the laws of the United States, from sailing his vessel upon New York waters. The State courts all upheld the validity of the law, and an appeal was prayed to the United States Supreme Court. The Supreme Court sustained the appeal, and declared the law invalid, in as far as it applied to the defendant's vessel. The actual decision of the Court was as follows: First, that the Federal coasting license laws were valid as an exercise by Congress of its powers to regulate interstate commerce; second, that those laws conferred upon vessels duly enrolled under them the right to navigate all navigable waters of the United States; third, that all valid enactments of Congress superseded and abrogated all State legislation inconsistent with them, and that, therefore, the New York law was invalid in so far as the exclusive privileges of navigation conferred by it operated to exclude licensed coasters from navigating the waters of the State.

This is all that was actually decided by the case,—that laws passed by Congress in exercise of its commercial powers were paramount to conflicting State legislation. The opinion of the Court, however, discusses at length the question with which this article is concerned,—the principle upon which to distinguish between the commercial power of Congress and the "police" powers of the States. In the course of the argument the defence raised the point that the New York law was a regulation of commerce, and that the power to regulate commerce was "exclusive" in Congress. The opposite side met this argument by denying that the commercial powers of Congress were "exclusive." In support of their position that the powers to regulate foreign or interstate commerce was possessed by the States concurrently with Congress, they instanced quarantine laws, inspection laws, health laws, etc., as being laws which were regulations of foreign or interstate commerce, but which were, nevertheless, confessedly within the powers of the State to enact. This argument in favor of "concurrency," based upon State quarantine laws, health laws, etc., was discussed at length by Chief-Justice Marshall in his opinion, and although he finally declined to pass upon the question of "concurrency" or "exclusiveness," and decided the case upon the ground stated above, this discussion is most valuable as suggesting the principle upon which to distinguish between laws affecting or operating upon foreign or interstate commerce which are, from those which

are not regulations of foreign or interstate commerce. The learned Chief-Justice met this argument in favor of concurrency by denying that the State laws adduced as instances of regulations of foreign or interstate commerce, enacted by the States were, in fact, regulations of such commerce. He points out that although quarantine laws, health laws, etc., may operate directly upon foreign or interstate commerce, it by no means follows that such laws are regulations of foreign or interstate commerce,—that the means employed in the exercise of entirely distinct sovereign powers may be the same, or nearly the same. Hence it follows that the operative effect of a law furnishes no certain criterion by which to decide from what sovereign power it emanated; and the fact that a State quarantine law operates upon foreign or interstate commerce, and contains provisions within the power of Congress to enact by virtue of its commercial powers, by no means proves that it is a regulation of foreign or interstate commerce. The following extract from the opinion of the Court clearly brings out the views expressed by the learned Chief-Justice :—

"It is obvious that the Government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State in the exercise of its acknowledged powers, that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the powers expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality."

How, then, are we to tell, in doubtful cases, to which of two or more possible sovereign powers a given law is to be ascribed? The answer is not far to seek, — from the object or aim of the Legislature in passing the law. This is clearly implied from the language of Chief-Justice Marshall, above quoted. He treats sovereign powers not as rights to use prescribed means, but as rights to aim at prescribed ends. In his view, the power to regulate foreign or interstate commerce did not confer upon Congress the power to enact laws containing provisions of some prescribed character, but to aim at the accomplishing of a general result by any legislative means whatsoever. It follows, then, that to test whether a given law is to be regarded as a regulation of foreign or interstate commerce, we must examine the object of the Legislature in passing the law. If the law was passed for the sake of the effect which it was to have upon foreign or interstate commerce, it must be regarded a regulation of such commerce; but if not, then the law is not to be regarded as a regulation of foreign or interstate commerce, although it may operate upon and affect such commerce in an important degree, the operative effect of the law being immaterial in deciding the question, except in so far as it throws light upon the intention of the Legislature.

All this, which is implied in, and is easily deducible from, the above-quoted language of Chief-Justice Marshall, is even more plainly brought out in the following extract from the separate opinion of Johnson, J., who held that the commercial powers of Congress were exclusive, and the New York law unconstitutional, as infringing upon them. He says: —

"Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct." The words "frankly exercised" plainly indicate that, in the learned judge's opinion, the intention of the Legislature in framing a given law determined the sovereign power to which it must be ascribed.

Having developed thus fully the views of Chief-Justice Marshall in Gibbons *v.* Ogden, we can now pass to the case of Willson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, a case which has given subsequent judges very great difficulty, and which many have deemed irreconcilable with the decision in Gibbons *v.* Ogden. In that case, the State of Delaware had authorized a company to

dam a small navigable tidal creek, for the purpose of reclaiming marsh land and improving the drainage of the surrounding territory. Willson, the owner of a sloop licensed as a coaster, had run into the dam with his vessel and injured it. In an action for damages for this injury, Willson set up that the law authorizing the dam was unconstitutional as infringing upon the powers of Congress to regulate foreign and interstate commerce, which, he contended, was "exclusive." The Court held that the law was not unconstitutional. The opinion of the Court, which was very brief, was delivered by Chief-Justice Marshall. The following extract gives the substance of it: "The act of Assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the State. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution, or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.'

"If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should not feel much difficulty in saying that a State law, coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, — a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh

Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

What is the true explanation of this case? Some judges have declared that it can be explained only upon the theory that the power to regulate foreign and interstate commerce is "concurrent," — to some extent, at least. This explanation of the case is a very improbable one. The Court, in Gibbons *v.* Ogden, although it did not decide that the commercial powers of Congress were exclusive, certainly showed a leaning in favor of that view; and Johnson, J., in his separate opinion, held squarely that that power was "exclusive." It is unreasonable to suppose that Chief-Justice Marshall would have decided in favor of the concurrency of the commercial power of Congress, without one word of comment upon the case of Gibbons *v.* Ogden, or that Johnson, J., would have joined in the opinion, had he supposed it so to decide. There is certainly no language in the opinion which expressly lays down the doctrine that the congressional commercial power is concurrent, wholly or in part. A much more satisfactory explanation of the case is that the Court intended to decide that the law was not a regulation of foreign or interstate commerce, because, although it no doubt operated to exclude foreign or interstate navigation from Black Bird Creek, it was passed with quite another purpose; namely, to enhance the value of property adjoining the creek, and to improve its drainage and sanitary conditions: that the State law, not being a regulation of foreign or interstate commerce, was also not in conflict with any Federal law passed by Congress, by virtue of its commercial power; and that, therefore, the law was perfectly valid under the commercial clause of the Constitution. This explanation makes the case consistent with everything the Court said in Gibbons *v.* Ogden. It is, moreover, entirely in harmony with the language of the opinion. In the opinion the Court point out the objects of the State law, and hold that "measures calculated to produce these objects" are within the powers of the State, unless conflicting with powers of the general government, and that the law in question did not, under all the circumstances of the case, come in conflict with "the power to regulate commerce in its dormant state," or with any law passed by Congress by virtue of that power.

The next case that we need consider is the case of City of New York *v.* Miln, 11 Pet. 102. That was the first case in which the judges of the Federal Supreme Court differed as to the validity of a State law, under the commercial clause of the Federal Constitution. In that case was involved the validity of a law of the State of New York, requiring the masters of all vessels arriving in the city of New York from the ports of other countries or States to make to the city authorities, within twenty-four hours of arriving, a written report containing the names, ages, and last places of settlement of all passengers landed in the city from their respective vessels. It was held that this law was not unconstitutional under the commercial clause of the Constitution, because it was not a regulation of foreign or interstate commerce, but a "police measure." Judge Barbour, who delivered the opinion of the Court, called attention to the reasoning in Gibbons *v.* Ogden, as justifying "measures on the part of the States, not only approaching the line which separates regulations of commerce from those of police, but even those which are almost identical with the former class, if adopted in the exercise of one of their acknowledged powers;" and quotes largely from Chief-Justice Marshall's opinion. Justice Story dissented, being of opinion that the State law was a regulation of foreign and interstate commerce, since it operated upon such commerce, and that the power to regulate foreign and interstate commerce was exclusive in Congress. He reasons that the law in question was a regulation of interstate and foreign commerce, because it was such a law as Congress might have passed by virtue of its commercial powers; and failed to grasp the principle laid down in Gibbons *v.* Ogden, and relied on in the majority opinion, that the same enactment may be ascribed to entirely distinct sovereign powers, according to the intention of the Legislature in passing it.

We now come to two cases — the License Cases, 5 How. 504, and the Passenger Cases, 7 How. 283 — which more than any others are responsible for the confusion and uncertainty in which the law relative to the distinction between the commercial power of Congress and the police power of the States is involved. Up to the time when the case of New York *v.* Miln was decided, the question of the concurrency or exclusiveness of the commercial power of Congress had given the Supreme Court no great difficulty. The Court, it is true, had declined to pass upon the question in advance of a case which, in their opinion, raised it; but it can hardly be doubtful

what their decision would have been had such a case come before them. During the ten years that elapsed between the decision in New York *v.* Miln, in 1837, and that in the License Cases, which were decided in 1847, circumstances had changed materially. In the first place, the question of State or national sovereignty had become much more prominent, in the ripening of events which afterward brought about the civil war. In the next place, there had been a great change in the *personnel* of the Supreme Court, and among the new judges were many advocates of the extreme State rights theory. These judges seized upon the License Cases and Passenger Cases as opportunities for committing the Supreme Court to the view that the commercial power of Congress was "concurrent" and not "exclusive,"—that view being consonant with their theory of State rights. They fought the fight in favor of "concurrency" with the zeal and fervency of intense conviction, and pressed into service every argument they could think of to support their cause. This vigorous onset of the State rights judges threw the Court into confusion. Some of the judges, who were not prepared to accept the view that the commercial power of Congress was "concurrent," were yet not prepared to commit themselves to the view that that power was "exclusive" and sought to avoid any decision of the question of "exclusiveness" or "concurrency." Other judges boldly came out in favor of the view that the power was "exclusive" in Congress. The result was that in both of those cases most of the members of the Court delivered lengthy separate opinions; each judge who delivered an opinion giving his individual position upon the question of "concurrency" or "exclusiveness," and arguing at length in support of it, any impartial or dispassionate examination of the question being almost impossible, owing to its vital political bearings.

With the License Cases and Passenger Cases we should not in this article be concerned, had they been taken up with a discussion of the question of "concurrency" or "exclusiveness" merely, for subsequent cases have since conclusively settled that the power is to a large extent, at any rate, "exclusive." But in that discussion the further question became involved of what constitutes a regulation of foreign or interstate commerce, and in this aspect those cases are of very great importance to us. This latter question became involved in the following way: We have seen that, at the time the case of Gibbons *v.* Ogden was before the Court,

the power of the States to pass laws affecting foreign or interstate commerce, such as quarantine laws, health laws, etc., was conceded, and the Court in that case explained those laws as emanations from the reserved powers of the States, and not as regulations of foreign or interstate commerce. The temptation to use such laws as an argument in favor of the "concurrency" theory was too strong for some of the judges to resist. They accordingly abandoned the explanation given in Gibbons *v.* Ogden, and held boldly that such State laws were regulations of foreign or interstate commerce, because operating upon or affecting such commerce, and argued from their admitted validity that the power to regulate foreign or interstate commerce must be "concurrent." This argument has had a very important influence upon the law, in that it has tended to obscure and overthrow the distinctions taken in Gibbons *v.* Ogden, heretofore adverted to, and has been, in the opinion of the writer, the fruitful source of error and confusion. It therefore becomes necessary to study with care the License Cases and the Passenger Cases, to see how far this argument obtained the assent of the Court, and how much authority it derives from those cases.

The License Cases involved the validity of State liquor license laws, which, it was claimed, were unconstitutional, in so far as they operated to impose a burden upon the sale of liquor brought into the State from without. The entire Court sustained the validity of the laws, but the judges were by no means agreed as to the reasons upon which the decision should be based. Justices McLean and Grier reached the conclusion that the laws in question were not regulations of foreign or interstate commerce, and that therefore no constitutional objection could be raised against them under the commercial clause of the Federal Constitution. This view of the case would seem to commend itself to reason and good sense. It did not, however, satisfy some of the "States rights" judges in the Court. Chief-Justice Taney took the position that the State laws were regulations of foreign or interstate commerce, in so far as they operated to impose burdens upon the sale in original packages of liquor brought into the State, but that the power to regulate foreign or interstate commerce was "concurrent," and that, consequently, the laws were valid. Justice Catron delivered an opinion agreeing in substance with that of Taney, C. J.

Justice Woodbury, in his opinion, agreed with Justices McLean and Grier that the laws in question were not regulations of foreign or interstate commerce, but maintained, with Chief-Justice Taney, that the power to regulate foreign or interstate commerce was concurrent. Justice Daniel, in his separate opinion, also agreed with Justices McLean and Grier that the laws in question were not regulations of foreign or interstate commerce. As to the question of "concurrency" or "exclusiveness," his leaning appears to have been in favor of "concurrency," although the opinion is not at all explicit upon this point. Of the two opinions, in which it was held that the State laws were regulations of foreign and interstate commerce, and that the power to regulate such commerce was "concurrent," that of Taney, C.J., is far the abler. He boldly lays down the doctrine that, upon the question whether a State law is or is not a regulation of foreign or interstate commerce, the object and motive of the State are of no importance and cannot influence the decision. That the operative effect, and not the motive or aim of the law determines whether or not it is a regulation of foreign or interstate commerce. Starting from this premise, he argues successfully that quarantine laws, pilotage laws, and other similar laws, operating directly upon foreign or interstate commerce, are regulations of such commerce, and that, since it is admitted that the States may pass quarantine laws, pilotage laws, etc., it follows that they possess concurrent powers of regulating foreign and interstate commerce.

Granting the learned Chief-Justice his premise, his reasoning is unanswerable. The difficulty is with his premise, which is directly opposed to the doctrine so clearly brought out in Gibbons *v.* Ogden, that the intention or purpose, and not the operative effect, of a law determines whether or not it is a regulation of foreign or interstate commerce. He makes an elaborate attempt to explain that case. He admits that "one or two passages in that opinion (in Gibbons *v.* Ogden), taken by themselves, and detached from the context, would seem to countenance this doctrine" (of the exclusive power of Congress), but maintains that these passages were in answer to the argument of counsel for *equal* "concurrent" powers in the State and Federal governments, and were merely intended to meet that argument, and not to deny to the States "concurrent powers" subordinate to the paramount power of Congress, whenever Congress should see fit to exercise that power. He

asserts that the case, as a whole, is in favor of a subordinate "concurrent power" in the States; and instances in support of this assertion the admission of the Court on pp. 205, 206, that a State may, in the execution of its police and health powers, pass laws operating directly upon foreign or interstate commerce. This argument in favor of "concurrent power" in the States, based on the language of Chief-Justice Marshall, entirely overlooks the distinction taken by him, and heretofore adverted to, that identical or very similar measures may emanate from entirely different sovereign powers, and that therefore the admitted validity of State laws, such as quarantine laws or pilotage laws, operating upon foreign or interstate commerce, and containing provisions such as Congress might enact by virtue of its commercial power, by no means proved that the State had concurrent power to regulate foreign or interstate commerce.

The opinion of Catron, J., adds nothing to the reasoning of Taney, C.J., and therefore may be passed over. The opinion of McLean, J., is not particularly noteworthy. It sustains the State law as a valid police regulation, but does not go into the general question of the distinction between police regulations and regulations of foreign or interstate commerce. Woodbury, J., in his opinion, seems clearly to recognize the intention of the Legislature in passing any given law as the ultimate test of whether it is a regulation of foreign or interstate commerce. Thus he says: "In settling the question whether these laws impugn treaties or regulate either foreign commerce or that between the States, or impose a duty on imports, ordinary justice to the States demands that they be presumed to have meant what they profess, till the contrary is shown. Hence as these laws were passed by States possessing experience, intelligence, and a high tone of morals, it is neither legal nor liberal to attempt to nullify them by any forced construction, so as to make them regulations of foreign commerce, or measures to collect a revenue by a duty on foreign imports; thus imparting to them a different character from that professed by their authors, or from that which by their provisions and tendency they appear designed for. These States are as incapable of duplicity or fraud in their laws, or meaning one thing and professing another, as the purest among their accusers; and while legitimate and constitutional objects are assigned, and means used which seem adapted to such ends, it is illiberal to impute other

designs, and to construe their legislation as of a sinister character, which they never contemplated." This language seems to make the object or purpose of a law the criterion of the sovereign power to which it is to be ascribed, and fully to harmonize with the principles laid down in Gibbons *v.* Ogden.

In the Passenger Cases, 7 How. 283, the validity of laws of Massachusetts and New York, imposing a tax upon every non-resident passenger landed within the State from every vessel arriving from a port of some other State or country, was involved. It was held by a divided Court, five judges against four, that the laws in question were invalid. All of the judges who delivered separate opinions in the License Cases delivered separate opinions in the Passenger Cases; and, in addition, Wayne and McKinley, JJ., who delivered no separate opinions in the former case, delivered separate opinions in the latter. The opinions in the Passenger Cases are substantially similar to the opinions delivered by the same judges in the License Cases, in as far as their general reasoning upon the question of "concurrency" or "exclusiveness" of the commercial powers of Congress is concerned. McLean, J., held that the laws were regulations of foreign and interstate commerce, that the power to regulate such commerce was "exclusive" in Congress, and that the laws were, consequently, unconstitutional. Wayne, J., favored the views of McLean, J., but preferred to rest his opinion that the laws were invalid upon the ground that they were in conflict with provisions of certain Federal laws and treaties. This opinion was substantially concurred in by Catron, McKinley, and Grier, JJ. Taney, C. J., upheld the validity of the laws chiefly upon the ground that the right of the States to determine what persons should be admitted within their boundaries was paramount to any Federal powers conferred by the Constitution, and that the right to impose a tax upon all persons admitted into the State was included in this right. He also took occasion to reiterate the views expressed by him in the License Cases as to the "concurrency" of the commercial powers of Congress. Daniel, J., was of opinion that the laws were not regulations of foreign or interstate commerce, and hence were not unconstitutional, even assuming the commercial powers of Congress to be exclusive. He was also of opinion that they did not conflict with any Federal laws or treaties.

By far the most able opinion delivered in the case was the

opinion of Woodbury, J. He concurred with Taney, C. J., as to the paramount right of the States to regulate the admission of persons within their boundaries, and also as to the "concurrency" of the power to regulate foreign and interstate commerce. He agreed with Daniel, J., that the laws in question were not regulations of foreign or interstate commerce. The part of his opinion in which he maintains that the laws are not regulations of foreign or interstate commerce is very valuable as reiterating and developing the principles stated in Gibbons *v.* Odgen. He took the position that the laws were not regulations of commerce, because not passed for the purpose of regulating it, but for an entirely different purpose. The following extracts from the opinion show clearly the views entertained by the learned judge: —

"This statute does not, *eo nomine*, undertake 'to regulate commerce,' and its design, motive, and object were entirely different." . . . "Many subjects of legislation are of such a doubtful class, and even of such an amphibious character, that one person would arrange and define them as matters of police, another as matters of taxation, and another as matters of commerce. But all familiar with these topics must know that laws on these by States for local purposes, and to operate only within State limits, are not usually intended, and should not be considered, as laws 'to regulate commerce.' They are made entirely *diverso intuitu*." . . . "To regulate is to prescribe rules, to control. But the State, by this statute, prescribes no rules for the 'commerce with foreign nations.' It does not regulate the vessel or the voyage while in progress. On the contrary, it prescribes rules for a local matter,— one in which she, as a State, has the deepest interest, and one arising after the voyage has ended, and not a matter of commerce or navigation, but rather of police, or municipal, or taxing supervision." . . . "These things are done, as Mr. Justice Johnson said in another case (Gibbons *v.* Ogden), 'with a distinct view' (from regulating commerce). And it is no objection that they 'act on the same subject,' or, in the words of Chief-Justice Marshall, 'although the means used in their execution may sometimes approach each other so nearly as to be confounded.' But where any doubt arises, it should operate against the uncertain and loose, or what the late Chief-Justice called 'questionable,' power to regulate commerce, rather than the more fixed and distinct police or taxing power."

All this is in full accordance with the doctrine of Gibbons *v.* Ogden, that Congress in exercising its powers of commercial regulations, and the States in exercising other sovereign powers reserved to them, may pass laws substantially similar or even identical in their provisions. Furthermore, it states expressly the principle, necessarily implied in this doctrine, that in all doubtful cases the intention of the Legislature must be looked to, to determine whether the given enactment is a regulation of foreign or interstate commerce, or an emanation from some other sovereign power; and that where the law purports to emanate from a well-recognized power possessed by the States, it should not be held a regulation of foreign or interstate commerce, unless the intention to regulate such commerce is clearly shown.

The result, then, of the License Cases and Passenger Cases, as far as they bear upon the question of what constitutes a regulation of foreign or interstate commerce, seems to be simply this: Chief-Justice Taney, in both cases, lays down the doctrine that any law which directly affects foreign or interstate commerce is a regulation of such commerce, and that the intention with which the law was passed is entirely immaterial. Justice Woodbury maintains the theory that a State law operating upon foreign or interstate commerce cannot be deemed a regulation of such commerce when passed *diverso intuitu;* or, in other words, that the purpose and not the operative effect of the law determines whether it is a regulation of foreign or interstate commerce or not. The other judges do not go into any general reasoning upon the subject.

The next case that we need consider is the case of Cooley *v.* Board of Port Wardens, 12 How. 299. In that case the long controversy over the question of concurrency or exclusiveness was at last settled. The Court reached the conclusion that the power to regulate foreign or interstate commerce was partly exclusive and partly concurrent. The case involved the constitutionality of a State pilotage law. The Court sustained the constitutionality of the law on the ground that the power to regulate foreign or interstate commerce was concurrent, as far as it concerns regulations local in their operation and effect, and that the pilotage law was a regulation of that character. The Court, in this case, lay down the principle that the power to regulate foreign or interstate commerce is in part "exclusive" and in part "concurrent," — "exclusive" as to subjects of the power in their nature

national, or admitting only of one uniform system or place of regulation; and "concurrent" as to all other subjects.

This decision appears to be a compromise decision. It appears to settle the old controversy as to "exclusiveness" or "concurrency," partly in favor of "exclusiveness" and partly in favor of "concurrency." That the commercial powers of Congress are to a large extent "exclusive" was definitively established by the case, and has never since been questioned. The chief difficulty is to fix with exactness the limits of that "exclusive" power under the decision. It is said that the "exclusive" power of Congress extends to all subjects of the power to regulate foreign or interstate commerce which are national in their nature, or admit of a uniform system of regulation. Now, it is extremely difficult to fix what the Court meant by subjects "national in their nature." Perhaps we can best ascertain the limits which the Court intended to fix for the "exclusive" powers of Congress by looking at the question from the other side, and examining the class of laws which have been deemed to fall within the "concurrent" power of the States. In Cooley *v.* Board of Wardens the Court held that pilotage laws fell within the concurrent power. In subsequent cases laws authorizing the bridging of navigable streams (Gilman *v.* Philadelphia, 3 Wall. 713), harbor improvement laws (County of Mobile *v.* Kimball, 102 U. S. 691), and quarantine laws (Morgan's S. S. Co. *v.* Louisiana Board of Health, 118 U. S. 455) have been held to be emanations from the "concurrent" power of the States to regulate foreign and interstate commerce. In regard to quarantine laws, bridge laws, and harbor improvement laws, they would seem clearly to belong to that class of laws which affect or operate upon foreign or interstate commerce, but which, according to the principle laid down in Gibbons *v.* Ogden, are not regulations of such commerce, because not passed with the intention of regulating it. The same thing seems to be true of pilotage laws, although Chief-Justice Marshall, in Gibbons *v.* Ogden, classed them as regulations of foreign or interstate commerce. Such laws are regulations of commerce, unquestionably, but not of foreign or interstate commerce, if an intention or aim to regulate foreign or interstate commerce is to be regarded as the test. They are intended to impose restrictions upon the navigation of ports or harbors of the State, their object being to render such navigation more safe. As far as the navigation within the State is a part of foreign or

interstate navigation, the laws undoubtedly affect interstate or foreign commerce; but the intention being to impose restrictions upon the part of the navigation taking place within the State only, the laws should be regarded as regulations of domestic, and not of foreign or interstate commerce. If, then, the laws above cited fairly illustrate the class of laws which are to be deemed to fall within the concurrent power under the case of Cooley *v.* Board of Wardens, it would seem that they are the same as the class of laws affecting foreign or interstate commerce, which, according to Gibbons *v.* Ogden, are not regulations of foreign or interstate commerce, because passed *diverso intuitu.* In this view of the case it practically decides that the commercial powers of Congress are wholly "exclusive," assuming the correctness of the principles laid down in Gibbons *v.* Ogden, since the "concurrent power" which the case decides that the States possess, is, in reality, not a power to regulate foreign or interstate commerce.

The distinction stated by the Court in Cooley *v.* Board of Wardens may have been suggested by language of Woodbury, J., in his opinion in the License Cases. As was above stated, he advocated the doctrine of the concurrency of the commercial power of Congress. At the same time, he was compelled to admit that powers were conferred upon Congress by the "commerce" clause of the Constitution which, in the nature of things, the State could not exercise. The power of the States must necessarily be limited to the enactment of regulations of foreign or interstate commerce operating upon subjects within their territorial limits. The power to pass general regulations of commerce operative throughout the entire country must, of course, be exclusive in Congress. In this view, it might properly be said that the distinction between the exclusive power and the concurrent power was that the former extended to all subjects national in their nature, or admitting of uniformity of regulation, and that the latter included everything else. But it seems clear that the case of Cooley *v.* Board of Wardens does not intend to distinguish between the "concurrent" and "exclusive" powers upon the basis of the territorial operation of the law. If it did, the case must be deemed overruled in that regard. Many State laws, strictly local in their operation, have been held unconstitutional as regulations of foreign or interstate commerce. Thus, in Welton *v.* State of Missouri, 91 U. S. 275, a State law imposing a license tax upon all persons ped-

dling within the State the products or manufactures of other States or countries, was held unconstitutional as a regulation of commerce; yet the operation of the law was clearly local.

We have now completed our examination of the six earliest cases decided by the Federal Supreme Court in which the distinction between laws which affect foreign commerce, and laws which are regulations of foreign or interstate commerce, is discussed, and we have seen that these cases lay down the principle that the object or aim of the Legislature in passing the law is the true ground of distinction, in so far as they lay down any well-defined principle at all.

Let us now consider how far, if at all, that principle has been modified by subsequent cases. The principle that the intention or purpose of the Legislature in passing it is the true criterion of whether a law is a regulation of foreign or interstate commerce or not, has been clearly established by the more recent cases to this extent, that a law operating upon foreign or interstate commerce, which is ostensibly passed in exercise of some reserved power of the State, but really for the sake of its effect upon foreign or interstate commerce, is deemed a regulation of foreign or interstate commerce. Thus, in Welton *v.* Missouri, 91 U. S. 275, a State law purporting to be a law for the licensing of peddlers, but which contained provisions discriminating against the products and manufactures of other States or countries, when sold by peddlers within the State, was held unconstitutional as a regulation of foreign and interstate commerce. So in the recent case of Walling *v.* Michigan, 116 U. S. 465, a law purporting to impose a license tax upon persons engaged in selling liquor within the State, but so drawn as to discriminate in favor of liquor manufactured in the State, was held a regulation of interstate and foreign commerce, and unconstitutional. A still more striking case is the recent case of Robbins *v.* Shelby Taxing District, 120 U. S. 489, in which a license tax imposed by Shelby Taxing District (the City of Memphis) on all persons selling goods in the district by sample, and not having regularly licensed houses of business there, was held unconstitutional, as being passed with the intention of discriminating against commercial houses of other States doing business in Memphis.

But while it is clear that the modern authorities fully support the doctrine that the real purpose or object of a law is the criterion of

the sovereign power to which it is to be ascribed, to this extent, that a State law passed with the real intention of regulating foreign or interstate commerce will be deemed a regulation of such commerce, whatever the ostensible purpose as stated in the title may be, it is by no means clear that the converse of this proposition — that a State law, not passed with the intention of negotiating foreign or interstate commerce, cannot be deemed a regulation of such commerce, whatever the nature of its provisions may be — can be regarded as law in the light of the modern decisions. Indeed, there are a good many dicta, and even some decisions, which seem to indicate that it is not law. These dicta and decisions seem to support the view that a State law operating upon foreign or interstate commerce, but passed to accomplish some object or aim within the well-recognized power of the State, and without any intention of regulating foreign or interstate commerce, will, nevertheless, be held to be a regulation of such commerce, if, in the opinion of the Court, the law affects foreign or interstate commerce to a greater degree than is necessary for the accomplishment of the object aimed at. It cannot be said that the above view is anywhere distinctly stated. The modern cases upon the commerce clause of the Constitution do not contain statements of general propositions of law. Still, it must be admitted that there are dicta, and perhaps some decisions even, which seem to favor that view. Thus, Strong, J., in delivering the opinion of the court in Railroad Co. *v.* Huesen, 95 U. S. 465, says, in speaking of the powers of a State: "While for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection." So Miller, J., in Chy Lung *v.* Freeman, 92 U. S. 275, a case involving the validity of a "passenger law," says: "We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question. The statute of California goes so far beyond

what is necessary, or even appropriate for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified."

These dicta appear to point in favor of the view above stated. Some decisions, too, seem to point the same way. Thus, in Railroad Co. *v.* Huesen, 95 U. S. 465, a State law prohibiting the importation into the State of Spanish, Mexican, or Indian cattle from the first of March to the first of November of each year, apparently passed for the sole purpose of protecting the State from the infections of a cattle disease known as Texas fever, was held unconstitutional as a regulation of interstate commerce, apparently because the Court thought the restrictions upon such commerce were unreasonably severe,—severer than was necessary for accomplishing the purposes of the act. So the case of Hall *v.* De Cuir, 95 U. S. 485, appears to lend support to the view above stated. In that case the constitutionality of a State law requiring all common carriers, while carrying passengers within the limits of the State, to furnish the same accommodations to white and colored passengers, was held unconstitutional as a regulation of interstate and foreign commerce. The decision is not based upon any general reasoning. One reason that was urged by the Court against the validity of the law was the inconvenience which such laws might cause to carriers doing an interstate business. For if one State might require the same accommodations to be furnished to whites and blacks, an adjoining State might require that separate accommodations be furnished them, so that a carrier might be required to change his accommodations for passengers every time he crossed a State line. All that a State could reasonably do to protect the rights of black passengers was to require that equally good accommodation be furnished to whites and blacks. A precisely similar line of reasoning was employed in the case of the Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois, 118 U. S. 557, where a State long-and-short-haul law was held unconstitutional as a regulation of interstate commerce, in as far as it applied to transportation within the State, which was a part of interstate transportation, on the ground that it was a regulation of interstate commerce.

This argument from inconvenience would have no validity upon the theory that an intention to regulate foreign or interstate commerce is necessary to constitute a law a regulation of such commerce. It can avail only upon the theory that a law not

passed with the intention of regulating foreign or interstate commerce may nevertheless be a regulation of such commerce, if it operates to impose restrictions upon foreign or interstate commerce which, in the opinion of the Court, are unreasonable. Still, it is by no means certain that these cases can be regarded as establishing any such general principle. While the decision of the Court in Railroad *v.* Huesen appears to go upon the "unreasonableness" of the provisions of the law, there is language in the opinion which would seem to indicate that the Court thought that the law was passed for the purpose of discriminating against the cattle of other States. Thus the Court say: "The object and the effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States." In this view the decision would rest on the same principle as Welton *v.* State of Missouri, 91 U. S. 275. As to the cases of Hull *v.* De Cuir, 95 U. S. 485, and Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois, 118 U.S. 557, it is not clear that they cannot be explained consistently with the principle that an intention to regulate foreign or interstate commerce is necessary to constitute a law or regulation of such commerce. In those cases the laws in question were no doubt regulations of commerce. They purported to be regulations of domestic commerce only; but when we come to consider the nature of the regulations, we see that if applied to that part of interstate transportation taking place within the State, they must almost necessarily operate extraterritorially. The effect of the law of Louisiana requiring carriers engaged in carrying passengers within the limits of the State to furnish the same accommodations to black and white passengers, so far as it applied to carriers doing an interstate business, would almost necessarily be to compel them to furnish the same accommodations to them throughout the entire trip, for the carrier could not conveniently change the accommodations during the trip; and if Louisiana required the same accommodations to be furnished blacks and whites within the State, he would practically be compelled, in the absence of conflicting legislation in the other States, to furnish them the same accommodations throughout the entire trip. As this effect of the law is so obvious, is it not to be deemed that one of the purposes for which the law was enacted was to accomplish this effect? The case of Wabash, St. Louis, & Pacific Railway Co. *v.* Illinois is capable of a similar explanation. The

State long-and-short-haul law could not practically be applied to the part of interstate transportation taking place within the State without materially affecting the rate for the transportation taken as a whole, and this obvious effect of the law indicates a purpose on the part of the Legislature to regulate interstate rates.

Directly opposed to the theory that a State law is to be deemed a regulation of foreign or interstate commerce, without regard to its purpose or object, if it impose a burden or restriction upon such commerce which the Court deem unreasonable, are the bridge cases. It is well settled that a State may authorize the obstruction of a navigable stream or other body of water by dams or bridges in any manner it may see fit. In Gilman *v.* Philadelphia, 3 Wall. 713, the Court say: "It must not be forgotten that bridges which are connecting parts of turnpikes, streets, and railroads are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power shall be exerted within the sphere of the commercial power which belongs to the nation." This doctrine that the States have absolute power to obstruct their navigable waters with such bridges or dams as in their judgment are required to meet the public need, and that this judgment is not reviewable by the Courts, however serious the obstruction of interstate or foreign navigation may be, is utterly opposed to the doctrine that a State law operating upon foreign or interstate commerce, but not intended to regulate it, will, nevertheless, be held unconstitutional, as regulation of such commerce, if, in the opinion of the Court, they impose unreasonable restrictions or burdens upon foreign or interstate commerce. If the latter doctrine is to be deemed established by the cases, then the bridge and dam cases must be regarded as an exception to the general rule.

The case known as the State Freight Tax Case seems to be largely responsible for the dicta and reasoning that appear favor-

able to the doctrine that a State law unnecessarily interfering with foreign or interstate commerce is unconstitutional, as a regulation of such commerce, regardless of the intention with which it was passed. That case involved the validity of a State law imposing a tax upon common carriers for every ton of freight carried by them within the limits of the State. It was held that the law was virtually a tax upon freight itself, and was, therefore, unconstitutional as to interstate freights. The decision of the Court goes entirely upon the operative effect of the law, and not at all upon the intention with which it was passed. Strong, J., who delivered the opinion, said: "How can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation? It is not the purpose of the law, but its effect, which we are now considering."

One of the reasons urged by the Court against the constitutionality of the law was, that if the constitutionality of State laws operating to impose a tax upon interstate freights was conceded, the States would virtually have it in their power to exclude such freights, since they could practically accomplish that result by making the tax so high as to prohibit the bringing of them within the State. This argument, which has also been employed in some subsequent cases, was deemed conclusive of the unconstitutionality of the law. It would seem, nevertheless, to be clearly fallacious. It proves too much. It would prohibit all State laws affecting foreign or interstate commerce. Thus it could be said that to admit the right of a State to impose quarantine restrictions upon foreign commerce would virtually empower the States to exclude foreign commerce by making the restrictions so severe as virtually to prohibit such commerce. In the case of the State Tax on Railway Gross Receipts, 15 Wall. 284, a case decided at the same time as the preceding case, a State law taxing common carriers according to their gross receipts was held constitutional, and yet, applying the reasoning of the preceding case, it would seem to be unconstitutional. The operative effect of the two laws would, probably, be nearly the same. The gross receipts of most roads are made up chiefly of earnings from the carrying of freight and passengers, and a tax on gross receipts would simply create an additional burden to be borne by the passenger and freight traffic. Of this additional burden, interstate freight and passenger traffic would have to bear its proportionate part. Then, why not argue that the right to impose such

a burden upon interstate traffic implied the power to prohibit such traffic.

The weakness in this argument is that it fails to recognize that the purpose of a law is to be considered and taken into account. Because a State may tax objects of interstate commerce for purposes of revenue, it by no means follows that it may tax them for the express purpose of excluding their admission into the State. The answer to the argument is contained in the following extract from the opinion of Swayne, J., in Gilman *v.* Philadelphia. Speaking of the power of the States to obstruct navigable streams by dams and bridges, he says: "Whenever it shall be exercised openly or covertly for a purpose in conflict with the Constitution or laws of the United States, it will be within the powers, and it will be the duty, of this Court to interpose with a vigor adequate to the correction of the evil;" or, in general terms, the power of the States to pass certain kinds of laws does not imply the power to pass them for an unconstitutional purpose. The notion that State laws "unreasonably" burdening foreign or interstate commerce are to be deemed unconstitutional as regulations of such commerce seems to have come as a modification of the extreme view of the law taken by the Court in the State Freight Tax Cases, and in the endeavor of the judges to avoid the logical consequences of that view. The position that any State law operating to impose a burden on foreign or interstate commerce was unconstitutional as a regulation of such commerce being untenable, in receding from that position the Courts passed to the position that only laws imposing unreasonable burdens upon foreign or interstate commerce were regulations of such commerce. This position, if not more defensible logically, is more satisfactory from a practical point of view.

We have now made a survey of all the more important cases and classes of cases decided in the Federal Supreme Court which bear upon the question of the respective powers of the State and Federal governments to enact laws operating upon foreign or interstate commerce. We have seen that the cases of Gibbons *v.* Ogden and Willson *v.* Black Bird Creek Marsh Co. state the principle that a sovereign power is to be regarded as a right to aim at a certain end, and not as the right to use certain means; that the United States in the exercise of the power to regulate foreign and interstate commerce, and a state in the exercise of some dis-

tinct reserved power, may pass laws similar or identical in their provisions, and that, therefore, the question whether a given State enactment is a regulation of commerce or not cannot, in doubtful cases, be answered without scrutinizing the purpose for which the Legislature passed it; that this principle was applied in the case of Miln *v.* New York, and recognized and developed by Woodbury, J., in his opinion in the License and Passenger Cases, he laying down the further principle, that in all the cases of doubt as to the purpose of a State law its constitutionality should be sustained; that, in the course of the controversy over the question of concurrency or exclusiveness of the commercial power of Congress, the principles laid down and the distinctions taken in the earlier cases were, to some extent, lost sight of, and were covered up and obscured by the dust and smoke of that controversy; that, in the case of Cooley *v.* Board of Wardens, that controversy was settled by what appears at first sight to be a compromise decision, to the effect that the commercial powers of Congress are in part exclusive and in part concurrent, which decision, however, on closer analysis, appears to be a practical victory for the cause of "exclusiveness," the part of the commercial power which is held concurrent being apparently intended to cover such laws, like quarantine laws, health laws, etc., which affect foreign or interstate commerce, but are passed with a different purpose from that of regulating such commerce, and which, consequently, are not to be deemed regulations of foreign or interstate commerce; that the more recent cases do not attempt to lay down general principles touching the means of distinguishing valid State laws affecting foreign or interstate commerce from State laws invalid as regulations of foreign or interstate commerce; that while the modern decisions amply recognize the principle that an intention to regulate foreign or interstate commerce is the criterion of a regulation of foreign or interstate commerce, to the extent of holding State laws, ostensibly framed for other purposes, unconstitutional, if really passed with the intent of regulating foreign or interstate commerce, there appears to be a tendency to abandon that criterion in the case of laws "unreasonably" burdening or impeding foreign or interstate commerce, though passed without intent to regulate such commerce, and to hold such laws invalid as regulations of foreign or interstate commerce, regardless of their object or purpose. We have seen that this tendency of

the law is opposed to the well-established principle of the bridge cases, and also to the principles laid down in the case of Gibbons *v.* Ogden.

Has this tendency become established law? The writer thinks that it has not. There has certainly been no deliberate repudiation in any of the cases of the doctrine of the case of Gibbons *v.* Ogden. On the contrary, that case has ever been regarded as the source and fountain-head of the law, and its utterances as almost above criticism. The dicta in the modern cases in conflict with the doctrine of Gibbons *v.* Ogden were, it would seem, the result of a failure to grasp and understand that doctrine, and not of a deliberate intention to lay down principles in conflict with it. In the very cases where those dicta are uttered, the case of Gibbons *v.* Ogden is often cited with approval, and in none of them is there the least attempt at criticism of that case. Again, the bridge cases can only be explained by the theory that intention is the only criterion of a regulation of foreign or interstate commerce; and the cases holding State laws ostensibly passed for some proper purpose, but really intended to regulate foreign or interstate commerce, to be regulations of such commerce, also strongly support that theory.

When we examine the question on principle, the arguments in favor of the theory of "intention" as the true criterion of a regulation of foreign or interstate commerce strongly preponderates. The theory that State laws "unreasonably" affecting foreign or interstate commerce may be held unconstitutional, as regulations of such commerce, is objectionable, in making a court of law the arbiter of the reasonableness or unreasonableness of a measure passed by a State to accomplish an object or aim admitted to be proper and legal. Again, Congress can at any time control State legislation deemed unduly oppressive to foreign or interstate commerce by positive enactment by virtue of its commercial power.

In the opinion of the writer, according to the law as it stands to-day, the purpose or intention of the State Legislature in passing a law operating upon foreign or interstate commerce is the only criterion of whether it is or is not a regulation of foreign or interstate commerce, and the difficulties of the law would be greatly lessened if the Courts would clearly and in express terms adopt this criterion.

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